Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The Supreme Court of the United States

October Term, 1996

Norfolk and Western Railway Company,
Petitioner,

v.

James L. Chittum,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, as interpreted by this Court in *Norfolk & Western Railway* v. *Liepelt*, 444 U.S. 490 (1980), requires state courts to permit the admission of evidence on the issue of damages demonstrating that future income streams would have been reduced by the payment of compulsory federal railroad retirement taxes on income.

LIST OF PARTIES AND RULE 29.6 DISCLOSURE STATEMENT

The only parties to this proceeding are the petitioner Norfolk and Western Railway Company and the respondent James L. Chittum.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Norfolk and Western Railway Company states that it is a subsidiary of the Norfolk Southern Railway Company, which in turn is a subsidiary of the Norfolk Southern Corporation.

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Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Virginia

---

PETITION FOR A WRIT OF CERTIORARI

Norfolk and Western Railway Company hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of the Commonwealth of Virginia in this case.

OPINIONS BELOW

The opinion of the Virginia Supreme Court is reported at 468 S.E.2d 877 (Va. 1996) and is included in the Appendix at 1a-9a. The opinion of the Virginia Supreme Court denying rehearing is not reported and is included in the Appendix at 10a.

JURISDICTION

The decision of the Virginia Supreme Court was entered on April 19, 1996. Norfolk and Western Railway Company petitioned for rehearing. The Virginia Supreme Court denied the petition on June 7, 1996. The juris-

diction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Federal Employers' Liability Act provides, in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of . . . such carrier, or by reason of any defect or insufficiency, due to its negligence, in its [equipment].

45 U.S.C. § 51.

The Railroad Retirement Tax Act provides, in pertinent part:

> **Rate of Tax**
>
> **(a) Tier 1 tax.**—In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee. For purposes of the preceding sentence, the term "applicable percentage" means [7.65%] under sub-

sections (a) and (b) of section 3101 for the calendar year.

(b) Tier 2 tax.—In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to 4.90 percent of the compensation received during any calendar year by such employee for services rendered by such employee.

26 U.S.C. § 3201.

STATEMENT

A. Factual Background

Respondent James Chittum, an employee of petitioner Norfolk and Western Railway Company, began working as a track laborer in June 1973. R. 298.[1] Later that year, Chittum was involved in a hunting accident in which he suffered a gunshot wound to the abdomen and spine. R. 299. As a consequence, Chittum was temporarily rendered paraplegic and underwent five years of rehabilitation. R. 300. Chittum eventually returned to work for Norfolk and Western, though he suffered from various neurological symptoms. R. 303. In 1981 Chittum stepped on a nail, but because of numbness in his foot did not discover the nail until he removed his boot at the end of the work day. Appellee's Br. in Va. S. Ct. at 1. Chittum attempted to care for the puncture wound himself, but the wound became infected and Chittum was hospitalized and required a skin graft on his heel. R. 307.

Chittum returned to work in 1982, R. 308, and performed a variety of jobs, R. 322. In 1989, after a fall at home, Chittum was pulled out of service on the railroad until he received medical clearance to resume working. R. 323. Chittum enlisted the services of a neurologist and, based on the doctor's medical report that

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[1] "R. ——" refers to the Joint Appendix filed with the Virginia Supreme Court.

Chittum would be "able to function quite well," R. 640-41, Chittum was allowed to resume work, this time as a painter's helper. R. 328. Shortly thereafter, Chittum began having trouble with his skin graft. R. 481. Again, he attempted to treat the problem himself before finally consulting a doctor. In 1991, Chittum again suffered a tear in the skin graft but he still tried to treat it himself while continuing to work. R. 355-56. This time, however, surgery was required to replace the skin graft, R. 389, and Chittum was never authorized by a physician to return to work. R. 392. In 1993, after three appeals, the Railroad Retirement Board awarded Chittum a disability and retirement annuity. R. 393-95.

B. The Federal Employers' Liability Act

The Federal Employers' Liability Act of 1908 ("FELA") governs liability for work-related injuries to railroad employees caused by their employers' negligence. See 45 U.S.C. § 51 *et seq.* FELA established a comparative fault standard of liability and eliminated the common law tort defense of assumption of risk. See 45 U.S.C. §§ 53-54. Pursuant to FELA, a railroad employee injured on the job may bring a negligence action for damages in state or federal court against his or her employer.[2] See 45 U.S.C. §§ 51, 56. Employers are liable in damages for "such injury or death resulting in whole or in part from the negligence of [the railroad] or by reason of any defect or insufficiency, due to its negligence," in various pieces of equipment. 45 U.S.C. § 51. Under this remedial scheme, plaintiffs are entitled to recover "the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received." *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 (1980) (citation and internal quotation

[2] This Court has held that FELA provides the exclusive remedy for railroad employees injured in interstate commerce. *See New York Cent. R.R.* v. *Winfield*, 244 U.S. 147 (1917).

marks omitted). Thus, a disabled employee injured by the employer's negligence is entitled to lost wages.

C. Railroad Retirement Taxes

Pursuant to the Railroad Retirement Act of 1974 ("RRA"), codified at 45 U.S.C. § 231 *et seq.*, eligible railroad employees are entitled to receive retirement and disability annuities. See 45 U.S.C. § 231a(a)(1). The Railroad Retirement Board awards these annuities from the Railroad Retirement Account (the "Account"). See 45 U.S.C. § 231f(c)(1). The Account is funded by "Tier 1" and "Tier 2" taxes paid by employers and employees ("railroad retirement taxes") in accordance with the provisions of the Railroad Retirement Tax Act ("RRTA"). See 26 U.S.C. §§ 3201, 3221; 45 U.S.C. § 231n(a). Employees pay a tax "imposed on the[ir] income" and employers pay an "excise" tax based on the compensation paid to their employees. 26 U.S.C. §§ 3201, 3221. Currently, employees pay 7.65% of their income as Tier 1 taxes and 4.9% of their income as Tier 2 taxes. See 26 U.S.C. § 3201.[3] These taxes are automatically withheld from the employee's paycheck. See 26 U.S.C. § 3202(a).

D. Proceedings Below

In 1992, respondent filed a FELA action against Norfolk and Western in the Circuit Court for the City of Roanoke, Virginia, claiming that petitioner had been negligent in allowing him to continue working in such a manner that his skin graft was destroyed. R. 1-4.[4] At trial, respondent introduced evidence of his work-life

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[3] Under 26 U.S.C. § 3231(e)(2)(B) the railroad worker's compensation subject to taxation is limited to an applicable base salary as determined under the Social Security Act, 42 U.S.C. § 430, currently $62,700. That capping provision is not applicable in this case.

[4] Petitioner does not present any question concerning liability in this petition for certiorari. The only issue presented concerns the proper calculation of damages.

expectancy and annual earnings in order to demonstrate his estimated lost future income stream. The trial court, however, both *in limine* and during the trial, refused to allow Norfolk and Western to present evidence that Chittum's stream of future income would have been discounted by the amount of railroad retirement tax that would have been deducted from his paycheck pursuant to the RRTA. R. 459-61 ("We have discussed *Liepelt* extensively"). The jury then awarded Chittum $300,000.

On appeal, the Virginia Supreme Court affirmed the trial court. At the end of its opinion, the state supreme court summarily dismissed Norfolk and Western's primary contention on appeal that this Court's opinion in *Norfolk & Western Railway* v. *Liepelt*, 444 U.S. 490 (1980), required the trial court to admit petitioner's evidence concerning the effect of railroad retirement taxes on Chittum's future income stream. App. 8a-9a. The Virginia Supreme Court, ignoring the plain reasoning of *Liepelt*, narrowly limited that decision to apply only to "income taxes" and excused the error of the trial court by concluding that it "d[id] not equate [railroad retirement taxes] with income taxes." App. 8a.

REASONS FOR GRANTING THE PETITION

The decision of the Virginia Supreme Court raises a significant question with respect to the uniform interpretation of future income damage calculations under the Federal Employers' Liability Act and similar federal remedial statutes. The decision below, refusing to permit the adjustment of a future income stream in order to arrive at a more "realistic measure" of the plaintiff's income and prevent the "overcompensati[on]" of the plaintiff, *Liepelt*, 444 U.S. at 493, 498, squarely conflicts with the holding of another state's appellate court, *Oltersdorf* v. *Chesapeake & Ohio R.R.*, 404 N.E.2d 320 (Ill. App. Ct.), *appeal denied* (Ill. Sept. 29, 1980), *cert. denied*, 450 U.S. 920 (1981), and is flatly inconsistent with the

principles enunciated by this Court and the lower federal courts, both with respect to FELA and to similar federal remedial statutes enacted to provide uniform coverage to protected classes of workers. Review by this Court is warranted to ensure uniformity in determining the proper measure of damages in FELA cases.

This Court has held that the need for uniform national policy renders the calculation of damages pursuant to FELA a substantive issue of federal law. *Monessen Southwestern Ry.* v. *Morgan*, 486 U.S. 330, 335 (1988). Nevertheless, many state courts, including the court below, have refused to comply with federal law and policy with respect to the proper subtraction of payroll taxes, such as social security and the railroad retirement tax at issue in this case, in determining future income streams. Compare *Madore* v. *Ingram Tank Ships, Inc.*, 732 F.2d 475, 478-79 (5th Cir. 1984) with *Marynik* v. *Burlington N., Inc.*, 317 N.W.2d 347, 350-51 (Minn. 1982) (refusing to deduct income tax or railroad tax from future income stream under FELA). Workers and employers now receive highly variable treatment in the calculation of federal damages awards depending upon the forum in which the calculation is made.

Moreover, the issue of how to calculate damage awards properly in order to compensate claimants for lost future income streams annually affects thousands of railroad workers and dozens of interstate railroads and involves millions of dollars in unnecessary "compensatory" expenses. There currently are 213,000 employees in the freight railroad industry, see *AAR to Congress: "Let's Get Acquainted,"* Railway Age, March 1995, at 12, and while injuries to railroad employees have been more than halved in the last decade, FELA lawsuits have more than doubled and now number in the thousands each year. See 1985-1995 AAR Claim & Litigation Reports (5,788 FELA suits filed in 1995); see also *Hearing Before the Subcomm. on Transportation and*

Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. 44 (1989) (statement of William H. Dempsey). In 1995, the railroad industry paid out $886 million in FELA claims, or 2.52% of gross operating revenues. See 1995 AAR Claim & Litigation Report; see also House hearing, *supra,* at 47-48. Permitting some courts to ignore the effect of railroad retirement taxes on future income streams, thereby overcompensating FELA claimants, has a substantial, detrimental effect on the railroad industry. In addition, it undermines the remedial policies underlying FELA and destroys the uniform application of federal law. For these reasons, review by this Court is both appropriate and necessary.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS REQUIRING THE USE OF NET, AFTER-TAX INCOME FOR THE CALCULATION OF LOST INCOME STREAMS, AS WELL AS THE DECISION OF THE APPELLATE COURT OF ILLINOIS.

This Court has repeatedly articulated the principle that an injured plaintiff, suing under the remedial FELA scheme, is entitled to recover compensation for "the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received." *Liepelt,* 444 U.S. at 493 (citation and internal quotation marks omitted). This Court held that FELA claimants were entitled to a recovery based on the "realistic measure" of their future income, which, because "[t]he amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government," is to be calculated from "after-tax income, rather than his gross income." *Id.* In *Liepelt,* the Appellate Court of Illinois had affirmed a state trial court's decision prohibiting the introduction of evidence showing how much income tax the claimant would have paid from his projected gross income. This Court re-

versed, holding that the evidence should have been presented in order to prevent "overcompensating the plaintiff." *Id.* at 498 (citation and internal quotation marks omitted).

In *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523 (1983), this Court affirmed these principles in a decision involving an analogous statutory scheme. In *Pfeifer*, a case arising under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), the Court, relying on *Liepelt*, held that not only income taxes but any avoided costs (including such items as the purchase of uniforms) should be deducted from a claimant's estimated lost income stream. *Pfeifer*, 462 U.S. at 534; see also *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 487 n.17 (1981) ("[n]one of the Court's reasoning [in *Liepelt*] was directed particularly at FELA"). Accordingly, this Court consistently has required trial courts to allow factfinders to hear evidence regarding deductions to gross future income streams in order to ensure that damage awards fully reimburse employees for their lost earning power, but do not "lead to the plaintiff recovering a windfall award." *Id.* at 486 n.16. *Cf. Rachel* v. *Consolidated Rail Corp.*, 891 F. Supp. 428, 431 (N.D. Ohio 1995) ("[Plaintiff's expert] may not . . . include in his calculation future Tier I or Tier II payments") (emphasis omitted).

The decision of the Virginia Supreme Court artificially limiting this Court's holdings to deductions for self-described "income taxes," App. 8a-9a, is flatly inconsistent with the clear import of these decisions. This Court has held that deductions under the Railroad Retirement Tax Act are, in fact, "[c]ompulsory federal taxes" on income. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 582 (1979). The RRTA itself clearly imposes the tax "on the income of each employee." 26 U.S.C. § 3201. In any event, it is undisputed that Chittum's net income was reduced by 12.55% by these mandatory federal railroad

retirement taxes prior to his injury. This significant reduction in gross wages simply cannot be ignored in arriving at any realistic measure of his lost future income stream. Regardless of whether these taxes are "income taxes," permitting Chittum to recover for railroad retirement taxes that he will never have to pay results in his overcompensation just as surely as allowing him to recover for the specific taxes at issue in *Liepelt*. Because the Virginia Supreme Court's decision improperly refusing to consider any deduction from future income streams other than narrowly defined "income taxes" will continue to affect myriad FELA damage calculations, this Court should review the decision below.

The decision of the Virginia Supreme Court is also directly in conflict with the holding of the Appellate Court of Illinois on this very issue. In *Oltersdorf* v. *Chesapeake & Ohio R.R.*, 404 N.E.2d 320 (Ill. App. Ct.), *appeal denied* (Ill. Sept. 29, 1980), *cert. denied*, 450 U.S. 920 (1981), an injured railroad worker brought suit under FELA. At trial, the court refused to permit the railroad company to offer any evidence of the impact of taxation on the plaintiff's lost future gross earnings. The Appellate Court of Illinois, unlike the Virginia Supreme Court, correctly applied this Court's decision in *Liepelt* (which had originated in that court), and reversed, holding that the trial court erred in excluding evidence demonstrating the impact of the railroad retirement taxes on the injured railroad worker's future income stream. *Id.* at 324-25. Because this important and recurring question of the proper treatment of railroad retirement taxes in calculating future income streams has been resolved in conflicting ways by the courts of different states, the decision below should be reviewed by this Court.

II. THE DECISION BELOW IS INCONSISTENT WITH THE DECISIONS OF NUMEROUS FEDERAL COURTS REQUIRING THE DEDUCTION OF SOCIAL SECURITY TAXES IN ORDER TO CALCULATE LOST FUTURE INCOME STREAMS UNDER ANALOGOUS STATUTORY SCHEMES.

This Court has held that conflicting interpretations of analogous statutory schemes is an issue worthy of this Court's review. See, *e.g.*, *Begier* v. *IRS*, 496 U.S. 53, 57 n.2 (1990). The decision of the Virginia Supreme Court is flatly inconsistent with the approach adopted by numerous decisions of the federal courts of appeals and one state court with respect to Social Security taxes under analogous federal remedial statutes, such as the Jones Act and the LHWCA.

As this Court has held, " '[t]he Railroad Retirement Act is substantially a Social Security Act for employees of common carriers.' " *Eichel* v. *New York Cent. R.R.*, 375 U.S. 253, 254 (1963) (per curiam) (quoting *New York, N.H. & H.R. Co.* v. *Leary*, 204 F.2d 461, 468 (1st Cir.), *cert. denied*, 346 U.S. 856 (1953)). Employees eligible for total disability benefits under the RRA receive the same annuity that they would receive under the Social Security Act ("SSA"). See 45 U.S.C. § 231b (a)(1). Moreover, the RRA provides that any individual's railroad annuity may be reduced by the amount of any Social Security benefit. See 45 U.S.C. § 231b(m). If a railroad employee leaves industry employment, the funds contributed to the RRA pension and disability account on behalf of the employee are transferred to Social Security. See 45 U.S.C. § 231f(c)(2). RRA annuity determinations likewise are made with reference to the SSA. See generally 45 U.S.C. § 231a (incorporating SSA definitions of "retirement age," "widow," and "divorced wife"). Railroad retirement tax benefits, "[l]ike Social Security, and unlike most private pension plans . . . are not contractual," and, thus, "Congress may alter, and even eliminate, them at any time."

Hisquierdo, 439 U.S. at 575. In sum, the RRA's pension and total disability annuities are essentially equivalent to those of the Social Security Act.[6] Accordingly, precedents concerning the appropriateness of deducting social security taxes from calculations of future income streams under analogous federal remedial statutory schemes are logically indistinguishable in the FELA context.

The Virginia Supreme Court refused to consider any precedents that were not decided under FELA. App. 8a-9a. As a result, the Virginia Supreme Court ignored the close historical relationship between many federal remedial statutes as well as the similarities between railroad retirement and Social Security taxes. In particular, FELA and the Jones Act, the federal remedial statute governing employer liability to seamen, are more than merely analogous; they are inextricably bound together by their legislative and judicial history. *American Dredging Co.* v. *Miller*, 114 S. Ct. 981, 989-90 (1994). This Court has repeatedly recognized, as does the statute itself, that the Jones Act is based upon FELA, and incorporates by reference FELA's modification and extension of common law rights and remedies for covered workers. *Id.* (citing *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 439 (1958)); 46 U.S.C. § 688(a). The Jones Act adopts "the entire judicially developed doctrine of liability" under FELA, *Kernan*, 355 U.S. at 439, and provides identical remedies to its workers, *Miller*, 114 S. Ct. at 989.

Other federal remedial statutory schemes also are manifestly similar to FELA. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*,

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[6] Similar parallels exist between the RRTA and the Federal Income Contribution Act ("FICA"). *See* Janet Spragens, *Tax Cases of the Federal Circuit in 1994*, Am. U. L. Rev. 2201, 2207 (1995) (both RRTA and FICA contributions are split between employer and employee); *New Decisions: Final Regulations Continue Existing Definition of RRTA Compensation*, 82 J. Tax'n 144 (1995) (compensation for RRTA purposes is determined with reference to FICA definition of "wages").

and the Death on the High Seas Act ("DOHSA"), 46 U.S.C. app. § 761 *et seq.*, both permit injured parties to sue for compensation where their claims might otherwise be barred or impeded by the common law of torts. 33 U.S.C. § 905(b); 46 U.S.C. app. § 766.

Under each of these closely parallel statutory schemes, all federal courts of appeals to address the issue, as well as one state court, have held that this Court's decision in *Liepelt* mandates the admission of evidence with respect to the effect of Social Security taxes on a plaintiff's lost income stream. See *Rachal* v. *Ingram Corp.*, 795 F.2d 1210, 1218 (5th Cir. 1986) (social security taxes must be subtracted from future income stream under Jones Act); *Madore* v. *Ingram Tank Ships, Inc.*, 732 F.2d 475, 478-79 (5th Cir. 1984) (same); *Hernandez* v. *M/V Rajaan*, 841 F.2d 582, 587-88 & nn.2-3 (5th Cir.) (subtracting social security taxes from future income stream under LWHCA), *other section of opinion corrected*, 848 F.2d 498 (5th Cir.), *cert. denied sub nom. Daniella Shipping Corp.* v. *Hernandez*, 488 U.S. 981 (1988); *Escobar* v. *Seatrain Lines, Inc.*, 573 N.Y.S.2d 498, 502 (N.Y. App. Div. 1991) (same); *Tallentire* v. *Offshore Logistics, Inc.*, 754 F.2d 1274 (5th Cir. 1985), *rev'd on other grounds*, 477 U.S. 207 (1986), *aff'd in relevant part on remand*, 800 F.2d 1390, 1392 (5th Cir. 1986) (subtraction of social security taxes proper under DOHSA).[6] There simply is no justification for treating taxes supporting annuities under these statutory schemes any differently from the railroad retirement taxes that fund railroad worker annuities and are automatically deducted from their gross incomes.

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[6] Under the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-10, which supplants the common law and provides compensation to individuals suffering from vaccine-related injuries, the Federal Circuit also has held that social security taxes must be deducted from future income streams in order to prevent overcompensation. *Euken* v. *Secretary of Dep't of Health & Human Servs.*, 34 F.3d 1045, 1047-48 (Fed. Cir. 1994).

This Court has repeatedly held that the need for a uniform national compensation policy renders the calculation of damages pursuant to FELA, the Jones Act, and other analogous statutes a matter of substantive federal law. *Monessen Southwestern Ry.* v. *Morgan*, 486 U.S. 330, 335 (1988); see also *Liepelt*, 444 U.S. at 493 n.5 ("One of the purposes of [FELA] was to 'create uniformity . . .' with respect to railroads' financial responsibility for injuries to their employees") (quoting H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908)). Decisions such as the one rendered by the Virginia court below, however, show that some state courts have refused to adhere to FELA's policies and this Court's precedents. For instance, in *Marynik* v. *Burlington Northern, Inc.*, 317 N.W.2d 347, 351 (Minn. 1982), the Minnesota Supreme Court held it was harmless error for the trial court to refuse admission of any evidence regarding the effect of income and railroad retirement taxes on plaintiff's future income stream. The Minnesota court reasoned that it would be too difficult for the jury to calculate the plaintiff's tax. *Id.* This argument, however, was expressly rejected by the Court in *Liepelt* because "the trial bar and the trial bench ha[ve] developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries." 444 U.S. at 494.

The refusal of the Virginia Supreme Court to recognize and defer to FELA's scheme of compensation destroys the uniformity which Congress intended for this federal remedial statute. Congress intended injured workers to be made whole no matter where their case might be heard. See H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908). This Court's decision in *Liepelt* regarding the effect of taxation and other deductions on the calculation of damage awards has become a "federal common law rule," *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473 (1981), designed to ensure that plaintiffs are treated fairly, but not overcompensated. *Id.* at 487. The rail-

roads' financial responsibility has been expanded significantly by the Virginia Supreme Court, however, extending far *beyond* the federal duty to compensate its injured employees fairly. The decision below not only guarantees that railroad workers will be treated differently in different states, but also unjustly burdens railroad companies whose employees bring FELA claims against them in Virginia courts. Because the disparate impact on the calculation of damage awards, both in Virginia and other states refusing to apply federal law in calculating FELA damages, will continue to affect detrimentally significant numbers of FELA claims and will bias the remedial effect of FELA toward overcompensating claimants, this case presents a significant question of federal law warranting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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